Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1130

JASPER FRANK POTTS, - - *Appellant-Movant*

V.

COMMONWEALTH OF
KENTUCKY - - - - - *Appellee-Respondent*

APPEAL FROM AN ORDER OF
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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February ....8....., 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

JASPER FRANK POTTS, - - - - - *Appellant,*

V.

COMMONWEALTH OF
KENTUCKY, - - - - - - - - - *Appellee.*

APPEAL FROM AN ORDER OF
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant appeals from a decision of the Kentucky Court of Appeals entered July 8, 1977, which was affirmed by the Supreme Court of Kentucky on October 24, 1977, in its Order denying a Motion for Discretionary Review.

OPINION BELOW

The opinion of the Court below is reported at ..... S.W. 2d (Ky., 197 ..). That opinion and the Order denying Discretionary Review are set forth in the Appendix, *infra*, pp. /4.....

JURISDICTION.

The Court of Appeals refused to consider whether or not the Appellant had had effective assistance of counsel during his trial. The Court of Appeals reasoned that if the issue of ineffective assistance of counsel had not been raised in the trial court, it could not be raised for the first time on appeal. The effect of this is to disallow any review for the question of ineffective assistance of counsel, unless the attorney who is being alleged ineffective, pleads his own ineffectiveness. Because said motion must be filed within five (5) days, counsel on appeal had no opportunity to raise it. Since no attorney is going to plead his own ineffectiveness, the practical effect of this decision is to disallow review for the issue of ineffective assistance of counsel. Thus the appellant brings this appeal pursuant to 28 USC § 1257 (2), challenging the validity of Kentucky Rules of Criminal Procedure 10.06 and 12.54 and their application as stated in *Caslin v. Commonwealth,* 491 S.W. 2d 832 (Ky., 1973).

The Order of the Court of Appeals of Kentucky, from which comes this appeal, was entered July 8, 1977, and mandate was effective on October 24, 1977, when the Supreme Court entered its order denying a Motion for Discretionary Review. The Notice of Appeal was filed in the Kentucky Court of Appeals on November 18, 1977.

This appeal is brought pursuant to 28 USC § 1257 (2).

It is well settled that a final judgment of the highest state court, which involves constitutionality of any

statute or authority exercised under any state, is subject to judicial review in the United States Supreme Court. *Weston v. Charleston,* 27 US 449 (1829).

Other cases supporting jurisdiction are *Huffman v. Pursue, Ltd.,* (1975) 420 US 592, 43 L Ed 2d 482, 95 S. Ct 1200, reh den 421 US 971, 44 L Ed 2d 463, 95 S Ct 1969, and *Hicks v. Miranda,* (1975) 422 US 332, 45 L Ed 2d 223, 95 S Ct 2281.

STATUTES INVOLVED

The Kentucky Rules of Criminal Procedure having the effect of statutes in question read as follows:

Rule 10.06 Time for Motion

The Motion for a new trial shall be served not later than five days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one year after the entry of the judgment or at a later time if the court for good cause so permits.

Rule 12.54 Time for taking

The time within which an appeal may be taken to the Court of Appeals shall be ten days after entry of the final order of judgment from which the appeal is taken, or ten days after entry of an order overruling a timely motion for new trial or for arrest of judgment, whichever is the later; provided, however, that in the case of a motion for new trial made later than five days after return of the verdict, upon the ground of

newly discovered evidence, the appeal must be from the order overruling the motion, and the review on appeal shall be limited to the ground timely raised by the motion as authorized by RCr 10.06.

Rule 1.10 Time

The provisions of the Rules of Civil Procedure as to time shall apply to the procedures in the Rules of Criminal Procedure where the latter rules do not specifically provide otherwise. The time shall not be extended for a motion for a new trial, a motion in arrest of judgment, the period for filing the record on appeal (except as provided in Rule 12.58), or the period for taking an appeal.

Kentucky Rules of Criminal Procedure 10.06, page 74; 12.54, page 84; 1.10, page 6.

QUESTION PRESENTED

Do Kentucky Rules of Criminal Procedure 10.06 and 12.54 and their application by the Kentucky Court of Appeals and the Supreme Court of Kentucky, as stated in the case of *Caslin v. Commonwealth of Kentucky*, 491 S.W. 2d 832 (1973), wherein the courts held that any appellant may not raise the question of ineffective assistance of counsel unless the counsel who is being alleged ineffective raises the question of his own ineffectiveness, or else the question will be forever barred, violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore vitiate the conviction of the appellant.

STATEMENT OF THE CASE

The appellant was convicted of statutory rape and sentenced to twelve years imprisonment. He obtained new counsel for appeal. The appellant's new counsel decided that there was an issue as to whether or not the appellant had received effective assistance of counsel in the trial court. This decision was based on trial counsel's failure to conduct an investigation, failure to interview witnesses and failure to introduce discovery motions. Also the appellant's trial counsel failed to have appellant undergo a medical examination, even though both the appellant and his wife stated that the appellant was impotent. Trial counsel also failed to introduce instructions for the jury. Also, the trial counsel did not know how to impeach witnesses, as was shown by a failure to impeach the alleged victim who testified at the preliminary hearing that the principal act had occurred twice a week for two years. The trial counsel didn't use the transcript of the preliminary hearing because he assumed that it would be read to the jury, which resulted in the alleged victim's testimony being accepted without challenge. The Court of Appeals refused to consider the issue reasoning that since the issue of effective assistance of counsel had not been raised in the trial court, that it had not been properly preserved for appeal. However, the issue could not have been raised in the trial court, because the trial counsel obviously wasn't going to raise the issue of his own effectiveness, and the new counsel couldn't raise the issue in the trial court because the short time for motion for a new trial, pursuant to Kentucky Rules of Criminal Procedure 10.06, had passed. The Appellant moved for discretionary review by the

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Supreme Court of Kentucky alleging that he had been denied due process in that he had not received effective assistance of counsel and the Kentucky Courts offer no means to obtain this Constitutionally guaranteed right. Said Motion was denied.

THE CONSTITUTIONAL QUESTION IS SUBSTANTIAL

The Appellant's case offers substantial federal questions because the Appellant's Constitutionally guaranteed rights of due process, fair trial, and effective assistance of counsel have been compromised so that the Commonwealth of Kentucky could more conveniently expedite appeals and motions for new trial. The power of a state to, in effect, suspend Constitutional rights in the interests of judicial convenience and expedience involves a substantial federal question which requires plenary consideration with briefs on the merits and oral argument.

CONCLUSION

For the reasons set out above, jurisdiction should be noted.

Respectfully submitted,

Garis L. Pruitt
Attorney for Appellant
P. O. Box 405
Ashland, Kentucky 41101

I, Garis L. Pruitt, Attorney for Appellant herein and a member of the Bar of the United States Supreme Court, hereby certify that on the 8th day of February, 1978, I served copies of this Statement of Jurisdiction to the Supreme Court of the United States on the several parties thereto as follows:

1. Commonwealth of Kentucky by mailing a copy in a duly addressed envelope with 1st class postage prepaid to:

Miles H. Franklin, Assistant Attorney General,
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

2. To Clerk of the Supreme Court of Kentucky by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Clerk of the Supreme Court of Kentucky
Martha Layne Collins
Room 209
State Capitol
Frankfort, Kentucky 40601

3. To Clerk, Court of Appeals of Kentucky, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

John C. Scott
Clerk, Court of Appeals
Twilight Trail
U.S. 127 South
Frankfort, Kentucky 40601

4. To the Assistant Commonwealth Attorney by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Avery L. Stanley
Assistant Commonwealth Attorney
Osman Building
Vanceburg, Kentucky

5. To the Honorable Trial Judge, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Honorable Oscar Sammons, Trial Judge
Courthouse
Greenup, Kentucky 41144.

On this the 8th day of February, 1978.

Garis L. Pruitt
Garis L. Pruitt

APPENDICES

Memo:

And afterwards, to-wit; on the 16th day June, 1975, at a Court held for the Greenup Circuit:

GREENUP CIRCUIT COURT
INDICTMENT No. 2191.

June 16, 1975.

Sentence: Judgment of Conviction:

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

Vs:

SENTENCE - JUDGMENT ON INDICTMENT

No. 2191.

On the Charge of Carnal Knowledge.

JASPER FRANK POTTS, - - - - - - - *Defendant*

The defendant was this day brought into Court, was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, none being shown, it is adjudged that the defendant, being ..... years of age, be taken by the Sheriff of Greenup County, to the jail of Greenup County and from there by the Sheriff of said County transferred to the custody of the De-

partment of Corrections and to remain in their custody for the period of not more than 12 years. The Sheriff of said County shall transfer the defendant to the custody of the Department at such location as the Department shall designate.

I, D. B. Crum, Clerk of the Greenup Circuit Court, do certify that the foregoing judgment is a true and correct copy of the judgment in the above styled case, entered on June 13, 1975, in the Greenup Circuit Court and spread upon the Order Book at Page 599.

Witness my hand as Clerk of the Greenup Circuit Court this 16th day June, 1975.

D. B. CRUM, Circuit Court Clerk
Greenup Circuit Court.

By: Thelma Crum, D.C.

Memo: And afterwards, to-wit: on the 9th day June, 1975, at a Court held for the Greenup Circuit:

COURT OF APPEALS OF KENTUCKY

76-257

JASPER FRANK POTTS, - - - - - *Appellant*

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE OSCAR SAMMONS, *Judge*
2191

COMMONWEALTH OF
KENTUCKY - - - - - - - - - - *Appellee*

AFFIRMING

* * * *

BEFORE: VANCE WILHOIT and WINTERSHEIMER, Judges.

VANCE, JUDGE: This appeal is from a sentence of twelve (12) years imposed upon appellant's conviction of the crime of having carnal knowledge of a female under the age of 16 years. Appellant raises three issues on the appeal: (1) the evidence was not sufficient to support a verdict of guilt; (2) the court erred in failing to admonish the jury as to the limited use of evidence of sexual acts other than the one for which appellant was tried, and (3) appellant was not afforded effective assistance of counsel.

The evidence against appellant consisted of the uncorroborated testimony of a fifteen-year-old prosecutrix, the step-daughter of appellant who lived in his

home, who was positive in her assertion that appellant had intercourse with her on three occasions over a two year period and fondled her body in an indecent manner on many occasions during that period of time.

An attempt was made to impeach her testimony by showing that she had testified at the examining trial that appellant had intercourse with her once or twice a week or at least 25 times. She denied that she had so testified.

We hold the prosecution testimony was not so incredible or improbable or so at variance with natural laws or common human experience as to be patently untrue. The verdict cannot be disturbed upon the ground of insufficiency of evidence. *Carrier v. Commonwealth*, Ky., 356 S.W. 2d 752 (1962); *Holland v. Commonwealth*, Ky., 272 S.W. 2d 458 (1954).

At the commencement of the trial appellant moved the court to require the prosecution to elect which act would be considered the principal offense and that the prosecution be restricted to any other testimony concerning other acts as merely corroborative of the principal act. When testimony of other acts was introduced the appellant did not request, and the court did not give, an admonition.

The failure to request the admonition constitutes a waiver. *Young v. Commonwealth*, Ky., 335 S.W. 2d 949 (1960). We also note that *Ware v. Commonwealth*, Ky., 537 S.W. 2d 174 (1976) seems to hold that no admonition is required under the circumstances of this case.

The issue of ineffective assistance of counsel has not been presented to the trial court and cannot be raised for the first time in this court.

The judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

Hon. Clifford R. Duvall
Pruitt & Duvall
P. O. Box 405
Ashland, Kentucky 41101

ATTORNEY FOR APPELLEE:

Hon. Robert F. Stephens
Attorney General
Hon. Miles H. Franklin
Assistant Attorney General

SUPREME COURT OF KENTUCKY

SC-361-D
(CA-76-257)

JASPER FRANK POTTS - - - - - - *Movant*

V. GREENUP CIRCUIT COURT
No. 2191

COMMONWEALTH OF
KENTUCKY - - - - - - - - - *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion of Jasper Frank Potts for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED October 24, 1977.

/s/
JOHN S. PALMORE,
Chief Justice

COURT OF APPEALS OF KENTUCKY

SC-361-D
(CA-76-257)

JASPER FRANK POTTS, - - *Appellant-Movant*

V. NOTICE OF APPEAL TO
SUPREME COURT OF UNITED STATES

STATE OF KENTUCKY - - *Appellee-Respondent*

I. Notice is hereby given Jasper Frank Potts, the appellant above named, hereby appeals to the Supreme Court of the United States, from the final Order of the Supreme Court of Kentucky affirming the judgment of the Court of Appeals of Kentucky and denying Appellant-Movant's Motion for Discretionary Review entered herein on October 24, 1977.

This appeal is taken pursuant to 28 USC section 1257 (2).

Appellant was convicted for the crime of carnally knowing a female under the age of 16 years and over the age of 12 years in violation of Kentucky Revised Statutes 435.100(b) was sentenced to 12 years confinement and is presently enlarged on bail for the sum of $10,000.00.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Record for Court of Appeals.

2. Transcript of Evidence.

3. Brief for Appellant of Court of Appeals.

4. Brief for Appellee Court of Appeals.

5. Order of Supreme Court of Kentucky assigning case to Court of Appeals of Kentucky.

6. Judgment of Trial Court.

7. Decision of Court of Appeals affirming sentence.

8. Movant's Motion for Discretionary Review.

9. Response to Motion for Discretionary Review.

10. Supreme Court Order denying Motion for Discretionary Review and affirming Court of Appeals decision.

11. Notice of Appeal of Supreme Court of United States.

III. The following question is presented by this appeal:

DO KENTUCKY RULES OF CRIMINAL PROCEDURE 10.06 and 12.54 AND THE APPLICATION OF THOSE RULES BY THE COURT OF APPEALS AND THE SUPREME COURT OF KENTUCKY AS STATED IN THE CASE OF *CASLIN VS. COMMONWEALTH*, 491 S.W. 2d 832

(1973) WHEREIN AN APPELLANT MAY NOT RAISE THE QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL UNLESS THE COUNSEL WHOM HE ALLEGES IS INEFFECTIVE RAISES THE QUESTION, AND IF NOT RAISED BE FOREVER BARRED: VIOLATE THE DUE PROCESS CLAUSE OF THE 5th and 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THEREFORE VITIATE THE CONVICTION OF THE APPELLANT.

/s/

GARIS L. PRUITT
Attorney for Jasper Potts
P. O. Box 405
Ashland, Kentucky 41101

PROOF OF SERVICE

I, Garis L. Pruitt, Attorney for Appellant herein and a member of the Bar of the United States Supreme Court hereby certify that on the 14th day of November, 1977, I served copies foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows:

1. Commonwealth of Kentucky by mailing a copy in a duly addressed envelope with 1st class postage prepaid to:
   Miles H. Franklin, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent.

2. To Clerk of the Supreme Court of Kentucky by mailing a copy in a duly addressed envelope, 1st class postage prepaid to the Clerk of the Supreme Court of Kentucky, Martha Layne Collins, Room 209, State Capitol, Frankfort, Kentucky.

3. To Clerk, Court of Appeals of Kentucky, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:
   John C. Scott, Clerk, Court of Appeals, Twilight Trail, U.S. 127 South, Frankfort, Kentucky 40601.

4. To the Assistant Commonwealth Attorney by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:
   Avery L. Stanley, Assistant Commonwealth Attorney, Osman Building, Vanceburg, Kentucky.

5. To the Honorable Trial Judge by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

   Hon. Oscar Sammons, Trial Judge, Courthouse, Greenup, Kentucky 41144.

/s/
GARIS L. PRUITT
Attorney for Appellant
P. O. Box 405
Ashland, Kentucky 41101

RECEIPT OF SERVICE

I, Miles H. Franklin, Assistant Attorney General of the State of Kentucky, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States this 20th day of November, 1977.

/s/
MILES H. FRANKLIN

IN THE

Supreme Court of the United States

October Term, 1977

JASPER FRANK POTTS, - - *Appellant-Movant*

V. ENTRY OF APPEARANCE AS COUNSEL

COMMONWEALTH OF
KENTUCKY, - - - - - *Appellee-Respondent*

Garis L. Pruitt, a member of the Bar of the United States Supreme Court, hereby enters his appearance as counsel for the appellant, Jasper Frank Potts, in the above styled action which is an appeal from a decision of the Kentucky Court of Appeals which was affirmed by the Supreme Court of Kentucky.

Garis L Pruitt

GARIS L. PRUITT
Attorney for Jasper Potts
P. O. Box 405
Ashland, Kentucky 41101

I, Garis L. Pruitt, Attorney for Appellant herein and a member of the bar of the United States Supreme Court, hereby certify that on the 8th day of February, 1978, I served copies of this Entry of Appearance as Counsel to the Supreme Court of the United States on the several parties thereto as follows:

1. Commonwealth of Kentucky by mailing a copy in a duly addressed envelope with 1st class postage prepaid to:

Miles H. Franklin, Assistant Attorney General,
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

2. To Clerk of the Supreme Court of Kentucky by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

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Frankfort, Kentucky 40601

4. To the Assistant Commonwealth Attorney by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Avery L. Stanley
Assistant Commonwealth Attorney
Osman Building
Vanceburg, Kentucky

5. To the Honorable Trial Judge, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Honorable Oscar Sammons, Trial Judge
Courthouse
Greenup, Kentucky 41144

On this the 8th day of February, 1978.

Garis L. Pruitt
GARIS L. PRUITT